

SOUTH AFRICA / JUDGMENT

Raubenheimer v Commission For Conciliation Mediation and Arbitration and Others

(J424/24) [2024] ZALCJHB 340 (21 August 2024)

[2024] ZALCJHB 340

COURT

Labour Court Johannesburg

BEFORE

Ford

CASE / FILE NUMBER

J424/24

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not reportable

Case Number: J424/24

In

the matter between:

ALEX
MUNROE RAUBENHEIMER
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND ARBITRATION
(CCMA)
First
Respondent
COMMISSIONER
LIVHU NENGIVHELA N.O.
Second
Respondent
RED
ANT SECURITY RELOCATION AND
EVICTION
SERVICES (PTY) LTD
Third
Respondent
FUZILE
BALINTULO
Fourth

Respondent
HERMAN
BREEDT
Fifth
Respondent
THE
SHERIFF OF THE HIGH COURT
JOHANNESBURG
Sixth
Respondent
FIRST
NATIONAL BANK
Seventh
Respondent

Heard: 7 August 2024

Delivered: 21 August 2024
(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 21 August 2024.)

JUDGMENT

FORD, AJ

Introduction

- [1] The vexed question this judgment intends to answer is this – what is the effect of a reinstatement application on contempt proceedings?
- [2] The applicant, whom I refer to as “Raubenheimer” instituted contempt proceedings against the third, fourth and fifth respondents, whom I refer to as “the respondents”. The sixth and seventh respondents are cited only to the extent that they are called upon, to give effect to some of the orders prayed for by Raubenheimer. Where specific reference to the third respondent is warranted, I do so, by referring to it as “the Red Ants”.
- [3] This court is not competent, given the nature of these proceedings, to grant the relief sought by Raubenheimer as reflected in prayers 4, 5, 6, 7 and 11. I will return to these prayers later in this

judgment.

The

facts

- [4] Raubenheimer was employed by the Red Ants in various capacities, prior to the termination of his employment on 13 October
2021. At that time, he was employed as assistant to the Chief Executive Officer.
- [5] Pursuant to his termination, Raubenheimer, referred an unfair dismissal dispute to the CCMA. The arbitration took place on 16 May and 20 June 2022, and was presided over by the second respondent, whom I refer to as “the commissioner”.
- [6] On 30 June 2022, the commissioner found Raubenheimer’s dismissal to have been procedurally fair but substantively unfair, and ordered the Red Ants to reinstate him on the same terms and conditions, no less favourable than those that govern the employment relationship at the time of his dismissal. Further, that the Red Ants was to pay Raubenheimer back-pay in the amount R371, 732.02 (three hundred and seventy-one rand, seven hundred and thirty-two rand, and two cents). This amount had to be paid by 22 July 2022.
- [7] The reinstatement was with retrospective effect (13 October 2021), and Raubenheimer was to report for work on 25 July 2022.
- [8] When the Red Ants failed to comply with the arbitration award (“the award”), Raubenheimer approached the CCMA to have it certified in terms of section 143 of the LRA[1]. On 18 July 2022, the CCMA certified the award in accordance with section 143(1) of the LRA.
- [9] On 22 July 2022, Raubenheimer received a letter from the Red Ants’ legal representatives, LHI Attorneys (“LHI”), dated 20 July 2022, informing him that LHI have been instructed to initiate review proceedings against the commissioner’s award. In the letter, Raubenheimer was requested not to report for duty on 25 July 2022, as provided for in the award. He was also informed that the Red Ants will not be paying any monies due to him in terms of the award.
- [10] The Red Ants instituted review proceedings in this court, under case number JR2299/22. It did not pursue the review application with the requisite diligence. In particular, it failed to deliver the arbitration record within the 60-day time period, contemplated in clauses 11.2 and 11.2.3 of the Labour Court Practice Manual.
- [11] On 12 October 2022, Pranav Jaggan Attorneys (“Pranav Jaggan”) issued a Bond of Security (“the bond”) in favour of the Red Ants. In the bond, it is stated that security is held in trust to the equivalent of the compensation award, which will be paid to Raubenheimer within 15 days of the [review] application being dismissed, or any further appeal hearing being dismissed.

- [12] On 8 November 2024, the Registrar of this court advised the Red Ants, that the record of proceedings under case number GAJB 2224-21 had been dispatched and is ready for collection.
- [13] On 2 February 2023, Goldberg Attorneys (“Goldberg”) wrote to Pranav Jaggan, and pointed out that the bond does not specify the actual amount that was paid by the Red Ants, and that a response is sought by 8 February 2023. From the papers before me, it is unclear whether there was a response to Goldberg’s letter.
- [14] Arising from the Red Ants’ failure to comply with the provisions of the then Practice Manual, this court per Mahosi J issued an order, on 7 August 2023, declaring the review application to be deemed withdrawn.
- [15] On 20 March 2024, the Red Ants instituted urgent proceedings in this court under case number J299/24, to stay the enforcement of the arbitration award. On 28 March 2024, Norton AJ, dismissed that urgent application.
- [16] On 10 April 2024, Pranav Jaggan requested written reasons for the order handed down by Norton AJ.
- [17] On 11 April 2024, Pranav Jaggan sent another letter to the learned judge’s registrar, Ms. R. Panday, attaching a “Notice of Leave to Appeal”, in which it filed an application for leave to appeal against the whole judgment and order of Norton AJ.
- [18] Raubenheimer approached this court on 9 May 2024, on an ex parte basis and obtained a Rule Nisi order for the respondents to show cause on 7 June 2024, why a final order should not be issued against them. Raubenheimer served the ex parte order dated 9 May 2024, on the respondents, but failed, according to the respondents, to also serve the actual application which resulted in that order. Service of the application, as confirmed in the respondents’ answering affidavit, was however effected at court on 7 June 2024.
- [19] On 7 June 2024, the court extended the Rule Nisi and postponed the matter to allow the respondents to file their answering affidavit.
- [20] Norton AJ had in the interim, delivered her written reasons in a judgment dated 11 June 2024.
- [21] There has been no prosecution of the application for leave to appeal, as provided for in terms of the old Rules of this court.
- [22] On 9 July 2024, the respondents served their answering affidavit on Raubenheimer via email. Although the answering affidavit is dated 12 July 2024, as per the court stamp, it appears to have been served on the remaining respondents on 11 July 2024.
- [23] In its answering affidavit in the contempt application, the respondents assert that an application to reinstate the review

application, has been filed. It refers to that application as an application to have the file “de-archived”.

[24] On 7 August 2024, the applicant elected to proceed with the contempt application, notwithstanding the fact that he did not file a replying affidavit.

[25] It is against this backdrop that I now deal with the contempt application of Raubenheimer.

Contempt proceedings

[26] The purpose behind contempt proceedings is first and foremost to secure compliance with court orders.

[27] In *Anglo American Platinum Ltd and another v Association of Mineworkers and Construction Union and others*[2], this court held that:

‘The principles applicable in an application such as the present are well-established. In *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006

(4) SA 326 (SCA), the Supreme Court of Appeal observed that the civil process for a contempt committal is a ‘peculiar amalgam’ since it is a civil proceeding that invokes a criminal sanction or its threat. A litigant seeking to enforce a court order has an obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court orders (see para 8 of the judgment). The court summarized the position as follows at para 42:

“To sum up:

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an “accused person”, but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and willfulness and mala fides) beyond reasonable doubt.
- (d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide, contempt will have been established beyond reasonable doubt.
- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”

[28] In dealing with the threshold requirements that a litigant has to establish to prove contempt, the Constitutional Court, in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma*, held that:

‘As set out by the Supreme Court of Appeal in *Fakie*, and approved by this court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish

a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.’ [3]

Enforcement of arbitration awards

[29] In our employment law jurisprudence, there are only two avenues available to employees to secure enforcement of arbitration awards under the LRA. These are:

29.1 section 143 proceedings; or

29.2 a section 158(1)(c) application to make an arbitration award, an order of court.

[30] Under the section 143 machinery, the employee may either approach the CCMA, or the Bargaining Council (whichever applies) and apply for the certification of the award in terms of section 143 of the LRA. When the award is certified, by the Director of the CCMA, the Sheriff is then tasked to execute in terms thereof. Section 143(1) states:

If a party fails to comply with an arbitration award that order the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.

[31] Under the section 158(1)(c) machinery, an employee may approach the Labour Court and apply to have the arbitration award made an order of court, whereafter the execution steps via the Sheriff’s offices take effect.

Staying the enforcement of arbitration awards:

[32] An employer against whom an award has been issued, are confined to three avenues to stay the enforcement of arbitration awards under the LRA.

The first basis

[33] An employer can stay the enforcement of an arbitration award in terms of the LRA, by posting security as contemplated in section 145(7) and (8), which provide as follows:

145 (7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).

145 (8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must –

- (a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or
- (b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.'

[34] Where sufficient security has been posted as contemplated in section 145(7) and (8), the enforcement of an arbitration award is automatically suspended.

The second basis

[35] An employer is also at liberty to seek a stay of the arbitration award, as provided for in section 145(3), which states:

The Labour Court may stay the enforcement of the award pending its decision.

[36] A purposive reading of this sub-section, seen against the qualifying provision of sub-sections 145(7) and (8), can only mean that the requirements imposed by section 145(7) and (8), do not divest the Labour Court from its statutory power to stay the enforcement of an arbitration award on any other basis.

The third basis

[37] Where an appeal is noted against any order given, emanating from contempt or section 158(1)(c) proceedings, an application for leave to appeal (properly prosecuted), stays the order giving effect to the enforcement of the award, unless challenged in terms of the Superior Courts Act[4].

[38] In *Muthambi v Mphahlele*[5], where the High Court dealt with a matter where contempt was challenged on the basis that a party communicated his attention to

apply for leave to appeal, the court said, in dismissing the application for contempt of court, per Van Der Schyff J:

... Irrespective as to whether the respondent is correct in his assertion that the order handed down by Nyathi J is appealable, it can hardly be said that a party who is of the view that an order is appealable and gives notice that he is seeking leave to appeal the order, is acting in wilful contempt of the court order handed down. The respondent was clearly advised that the order handed down by Nyathi J is final in effect and appealable. His position in this regard creates a reasonable doubt to the existence of wilfulness and mala fides. As a result, the prayers that a declaratory order is granted to the effect that the respondent's refusal to return the minor

children to the applicant on 27 January 2023, stands to be dismissed.

[39] The only recourse a party has to seek enforcement of an order, even where an application for leave to appeal has been filed, is to invoke the machinery contemplated in terms of section 18(1), read with section 18(3), of the Superior Courts Act, Act 10 of 2013, and to seek an order that the operation and execution of a judgment and order of this court, shall not be suspended pending a decision on an application for leave to appeal and, in the event of leave to appeal being granted, the outcome of such appeal.

Analysis

[40] I now return to the question set out in the introduction, namely – what is the effect of a reinstatement application on contempt proceedings? A reinstatement application once revived, renders the review proceedings compliant with the LRA and the rules of this court. The LRA is quite clear, a review application does not suspend the enforcement of an arbitration award. And if a review application does not suspend the enforcement of an arbitration award, then an application to reinstate the review must by necessary implication, suffer the same fate. It is only when security is provided, that a review application suspends the enforcement of an arbitration award.

[41] Where a review application is deemed withdrawn, even where security has been posted, the basis for staying the enforcement of an arbitration award, axiomatically, falls away. And if there is no basis to stay the award, then the enforcement process in respect thereof, must proceed unhindered.

[42] In the matter before me, the impediment that the respondents raise against being held in contempt, is the fact that an application to “de-archive” the file is pending (“the reinstatement application”). The LRA does not recognise such a process as a basis to stay the enforcement of an award, and it cannot equally be a basis to oppose contempt proceedings.

[43] The requirements for proving contempt were authoritatively dealt with in *Fakie NO v CCII Systems (Pty) Ltd*[6] where the Court said:

‘The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to

act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that which is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith). These requirements

- that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces.'

[44] In *Pheko and Others v Ekurhuleni Metropolitan Municipality and Another*[7] dealt with the ratio in *Fakie* and then summarised the position as follows:

Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.'

[45] And in explaining the concept civil contempt, the court said:

'The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour.'

[46] *Snyman AJ's*, exposition pertaining to contempt and what proof is required resonates well with *Fakie*. He said:

'Therefore, and in terms of the ratio in *CCII Systems*, for this Court to be satisfied that a respondent in a contempt application is indeed in contempt of Court, the Court must be satisfied, beyond reasonable doubt, that:

- (1) there was a refusal to comply with the Order; (2) this refusal was wilful (deliberate); and (3) the deliberate refusal to comply must be mala fide, in other words there must be a complete absence of any kind of bona fide justification for the refusal to comply (even if this justification relied on is ultimately found to be objectively unreasonable or unsustainable). Crystalized down to its simplest terms, a respondent is in contempt where the respondent knows and understands the terms of the order and what is required to be done to comply with the order, but then without any cause or justification deliberately does not comply. This is what the Labour Court in fact held in *National Union of Mineworkers and Others v B K H Mining Services CC t/a Dancarl Diamond Mine and Others*⁷ where it was said: '... What must be proved according to that standard is:

(a) that an order of court was granted against the respondents, (b) that the respondents were aware of the order and its terms, (c) that the respondents were in fact in breach of the order and, if so, (d) that their failure to comply with the order was wilful.”

[47] In *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma*, the Constitutional Court, held that:

‘As set out by the Supreme Court of Appeal in *Fakie*, and approved by this court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish

a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.’ [9]

[48] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*, the court held that the standard of proof, alluded to in *Fakie*, is clearly dependent on the consequences of the various remedies available. Where a party seeks remedies such as imprisonment or fines, which materially impacts an individual's freedom and security, such are subject to the criminal standard of proof (beyond all reasonable doubt). In such an instance, the respondent merely needs to lead evidence that creates a reasonable doubt that the

non-compliance was wilful and mala fide. Where civil contempt remedies are sought (e.g. declarators or structural interdicts) the respondent must lead evidence, on a balance of probabilities, that the non-compliance is not wilful and mala fide. [10]

[49] In the matter before me, the applicant has proved the existence of the order, and the fact that the respondents have knowledge thereof. The reason for the respondents’ non-compliance as confirmed in his argument before this court, Mr. Mokhare SC stated that there is a reinstatement application pending. As explained above, such an application does not suspend the enforcement of the award [order]. The only question that remains is whether the non-compliance of the respondents can be said to be mala fide. Having properly considered all the papers in this matter, and the absence of a justifiable basis or reason for non-compliance with the arbitration award, I conclude that the respondents are in contempt of court.

The relief sought under prayers in prayers 4, 5, 6, 7 and 11

- [50] In terms of prayer 4 of the contempt application, the applicant is seeking 24 months' remuneration against the respondents, for refusing to reinstate him. This is in effect an application for 24-months' back-pay in circumstances where the amount of back-pay is already set out in the arbitration award. In terms of prayer 4, this court is called upon to vary the arbitration award, which it is not empowered to do. I can accordingly not grant the relief as sought in this prayer.
- [51] In terms of prayer 5, the applicant seeks an order for the loss of annual bonuses. Such relief can only be issued upon an application when the respondents allow the applicant to resume his duties.[11]
- [52] In terms of prayer 6, the applicant seeks a claim for damages in the amount of R500,000.00 for a stomach injury he sustained while moving a lion during a veld fire. This court is not competent to grant relief for personal injuries.
- [53] In terms of prayer 7, the applicant seeks an order of compensation in the amount of R190 735 for payment towards a house that he bought from the third respondent. This court is not competent to grant such relief.
- [54] In terms of prayer 11, the applicant seeks an order against various parties not listed in this application, and for this court to rule against the respondents' legal representatives, shareholders or directors who appeal or prolong the court's judgment. This court cannot grant an order against parties who are not cited in this application. Moreover, the court cannot grant an order against any party for exercising a right which accrues to him/her/it by operation of law.

Conclusion

- [55] The respondents have failed to comply with the arbitration award, in circumstances where no justifiable reason or basis for such failure exists. They are, as stated earlier, in contempt of court. In the result, I make the following order:

Order

1. The respondents are guilty of contempt of court.
2. The respondents are ordered to effect payment of the arbitration award with interest, to the applicant, within 7 (SEVEN) days of this order and to permit the applicant to resume his duties on 1 September 2024;
3. Should the respondents fail to effect the payment of the arbitration award, as set out in prayer 2 above, the sixth respondent is ordered to attach the first respondent's banking account, held with the seventh respondent, and recover such monies due to the applicant in satisfaction of the award, with interests;

4. In the event that the respondents fail to comply with this order, the directors of the third respondent including but not limited to [FUZILE BALINTULO and HERMAN BREEDT] are each to be sentenced to a period of 30 days' imprisonment and the Department of Correctional Services is authorised to take them into imprisonment to serve their committal.
5. Prayer 4 of this order is wholly suspended, for a period of 14 [court days] pending the payment and compliance with prayers 2 and 3 of this order.
6. There is no order as to costs.

Bart Ford

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr. Goldberg (Goldberg Attorneys) For the Respondents: Adv. W. Mokhare SC
Instructed by: Pranav Jaggan Attorneys

- [1] Labour Relations Act, Act 66 of 1995 as amended. Section 143. Effect of arbitration awards (1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award. (2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise. (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1). (4) If a party fails to comply with an arbitration award that order the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.
- [1] Labour Relations Act, Act 66 of 1995 as amended. Section 143. Effect of arbitration awards
- (1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.
 - (2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.
 - (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).

- (4) If a party fails to comply with an arbitration award that order the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.
- [2] [2014] ZALCJHB 60; (2014) 35 ILJ 2832 (LC) at para 4.
- [3] Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others
- [2021] ZACC 18; 2021 (5) SA 327 (CC) para 37.
- [4] Act 10 of 2013
- [5] 2023 JDR 0333 (GP) para 10
- [6]
- [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 22
- [7] 2015 JOL 33198 (CC) at para 28
- [8] Id at para 30
- [9] Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others
- [2021] ZACC 18; 2021 (5) SA 327 (CC) para 37.
- [10] Matjhabeng Local Municipality v Eskom Holdings Ltd and Others [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 67
- [11] National Union of Metalworkers of South Africa obo M Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd) (CCT04/16) [2017] ZACC 9; [2017] 6 BLLR 539 (CC); 2017 (7) BCLR 851 (CC); (2017) 38 ILJ 1560 (CC) (30 March 2017)

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